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IN THE

Supreme Court of the United States

October Term, 1966.

No. 788

AL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

International, 711 So. 8th St., Phila., Pa. 19106—Tel. MA 7-5711 Area Code 215

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

AL HARRIS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 25, 1966.

OPINIONS BELOW.

The opinions on the prior appeal are reported at 334 F. 2d 460 and 382 U. S. 162. The opinion on this appeal (Appendix A, *infra,* pp. A1-A3) has not yet been reported.

JURISDICTION.

The judgment below (Appendix B, *infra,* p. A4) was entered on October 25, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, in a proceeding for criminal contempt under 18 U. S. C. § 401(3) and Rule 42(b), F. R. Crim. P., for refusal to answer questions before a Grand Jury, the prosecution must make the same showing that the unanswered questions are pertinent to the inquiry as is required in a prosecution under 2 U. S. C. § 192 for refusal to answer questions before a Committee of Congress.

2. Whether in this case, where the Grand Jury subpoena served on the witness required him to testify "in regard to an alleged violation of Sections 501 and 203(c), Title 47, United States Code," and the witness was given immunity under the Communications Act, there was sufficient proof of pertinence where the tariffs alleged to have been violated were never put into evidence at the trial of the witness for contempt in refusing to answer questions before the Grand Jury.

3. Whether a witness can be properly convicted of refusing to answer questions, the answers to which he claims violate the First and Fifth Amendments, where the prosecution refuses to produce evidence that appellant claims would show that there was no "substantial relationship" to the area which falls within the specific immunity statute here involved.

STATUTES INVOLVED.

The statutes involved are set forth in Appendix C, *infra*, pp. A5-A8.

STATEMENT.

This matter is here for the second time.

On the earlier occasion, petitioner was charged with contempt for refusing to answer certain questions asked him before a grand jury in the Southern District of New York; he was tried, as for a contempt committed in the presence of the court, pursuant to Rule 42(a), F. R. Crim. P.; was convicted; and was sentenced to one year's confinement. The court below affirmed (344 F. 2d 460), but, on certiorari, this Court reversed, holding that since the essence of the offense charged against petitioner was his refusal to answer questions before the grand jury, no contempt had been committed in the presence of the court, so that he was triable only under Rule 42(b). *Harris v. United States,* 382 U. S. 162, overruling *Brown v. United States,* 359 U. S. 41.

Accordingly, he was retried under Rule 42(b), on which occasion the following facts were developed:

The subpoena issued to petitioner (Govt. Ex. 1, R. 39a-40a) required him "to testify and give evidence in regard to an alleged violation of Sections 501 and 203(c), Title 47, United States Code"; these provisions are set forth in Appendix C, *infra,* pp. A6-A8.

The questions that petitioner refused to answer before the grand jury after having been granted immunity under Sec. 409(L) of the Communications Act (*infra,* pp. A6-A7), on the stated ground of tending to self-incrimination, were these (R. 43a-46a, 48a, 58a-61a):

1. "Do you know of a phone call made by John Manarite around January or early February of this year (1963) from Miami, Florida, to Flushing, New

York, in connection with the leasing of the premises in Ojus, Florida, for the purposes of a dice game?"

2. "Do you know whether or not Mr. Manarite used a pay telephone?"

3. "Do you know whether or not he used private premises to make that telephone call?"

4. "Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?"

5. "Do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?"

6. "Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one, Carmine Tramunti?"

7. "Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?"

8. "Mr. Harris, I ask you, do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?"

9. "In connection with this phone call were you a partner in the operation of the dice game at the premises in Ojus, Florida?"

10. "Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?"

It was stipulated (R. 32a) that, if asked the same questions, petitioner would refuse to answer the questions on First and Fifth Amendment grounds; that he was personally present in Miami, Florida, during the period that the alleged dice game took place; and that the grand jury before which he was called in 1963 is no longer in session.

Petitioner at the first session of his trial claimed a jury trial (R. 10a-11a).

In the course of the trial petitioner interposed objections on several grounds: (1) That a grand jury sitting in the Southern District of New York lacked jurisdiction to investigate matters occurring in Florida (R. 20a-21a, 23a, 28a-30a); (2) that the prosecution failed to put into evidence any tariffs whose violation was prohibited by 47 U. S. C. § 203(c) (*infra*, p. A6) (R. 21a); and (3) that the prosecution had failed to show that the questions asked were pertinent to the grand jury's inquiry, and also refused to submit relevant evidence tending to establish pertinency (R. 32a-35a).

Petitioner was once more convicted (R. 35a), and once more sentenced to one year's confinement (R. 98a).

On appeal, the court below reduced the sentence to six months' confinement on the authority of *Cheff v. Schnackenberg*, 384 U. S. 373, 380, and in all other respects affirmed.

REASONS FOR GRANTING THE WRIT.

First. This petition raises, first, the question whether the grand inquest of the nation—a congressional committee—is to be governed by broader restrictions than the grand inquest of a single judicial district.

It is submitted that precisely the same standards and restrictions should—and do—govern both kinds of investigations.

With respect to the grand inquest of the nation, the congressional committee, this Court said in *Russell v. United States,* 369 U. S. 749, 758-759 [citations omitted]:

> "The crucial importance of determining the issue of pertinency is reflected in many cases which have come here since *Sinclair* [*v. United States,* 279 U. S. 263]. * * * Our decisions have pointed out that the obvious first step in determining whether the questions asked were pertinent to the subject under inquiry is to ascertain what that subject was. * * * Identification of the subject under inquiry is an essential preliminary to the determination of a host of other issues which typically arise in prosecutions under the statute. * * *".

And the conviction in the *Russell* case was reversed because the indictment there did not set forth the subject matter of the inquiry. *Accord: Silber v. United States,* 370 U. S. 717 (plain error).

It is true that the contempt of Congress statute (2 U. S. C. § 192; *infra,* p. A5) uses the language, "refuses to answer any question pertinent to the question under inquiry," while in respect of a refusal to answer questions propounded before a grand jury the statute, 18 U. S. C. § 401(3) (*infra,* p. A5), simply speaks of a

court's "lawful * * * order, rule, decree, or command." But surely there is no difference in substance.

Of course grand juries like congressional committees have broad investigative powers, which are not to be construed in niggardly fashion. But it is still plain that neither body is exercising its admittedly broad powers when either undertakes to ask questions not pertinent to the subject matter of its inquiry.

Subject to qualifications not relevant here (e.g., *United States v. Rumely,* 345 U. S. 41) it may fairly be said that neither body is limited in formulating the scope of its inquiry. But neither can seek the aid of the courts in punishing witnesses who refuse to answer questions outside that scope. In each instance, the announced subject matter of the inquiry limits the duty of the witness. *Gojack v. United States,* 384 U. S. 702.

In the case of a congressional committee, the subject matter under inquiry is formulated by the authorizing resolution, and must moreover appear in the indictment (*Russell v. United States,* 369 U. S. 749); while in the case of a grand jury investigation, scope of its inquiry is formulated by the grand jury subpoena. In this connection it may properly be noted that it is far less cumbersome to enlarge the scope of a grand jury's investigation by including appropriate matter in the blank subpoena, a printed form, than it is for a committee of Congress to obtain from its parent House an amendment to its authorizing resolution.[1]

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1. On the first appeal of this case, the court below said (334 F. 2d at 462) that a witness was sharply limited in his inquiry into the subject matter of a grand jury investigation, citing *Blair v. United States,* 250 U. S. 273, and *United States v. Levine,* 267 F. 2d 335 (C. A. 2).

Neither authority cited has current vitality in respect of the rights of witnesses haled before investigative bodies.

In short, contrary to the holding below, it is submitted that, just as the prosecution in a case of refusal to answer questions put by a congressional committee must show those questions to have been pertinent to the scope of the committee's inquiry, so here it must show that the questions petitioner refused to answer were pertinent to the grand jury's inquiry.

Resolution of that question very plainly qualifies as a matter of public importance.

Second: The subpoena pursuant to which petitioner appeared before the grand jury called on him (R. 39a-40a) "to testify and give evidence in regard to an alleged violation of Sections 501 and 203(c), Title 47, United States Code."

The questions asked primarily concerned only an alleged dice game in Florida, and a telephone call to New York potentially connected therewith that *originated* in Florida.

Local affairs in Florida, plainly enough, are not the subject matter of investigations by a grand jury in the Southern District of New York; as this Court said

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Just as *Mason v. United States,* 244 U. S. 362, does not accurately reflect the present scope of the privilege against self-incrimination as that privilege has since been formulated in *Hoffman v. United States,* 341 U. S. 479, so *Blair v. United States,* 250 U. S. 273, has been superseded in respect of the witness's right to challenge the pertinency of the questions asked him, certainly since *Russell v. United States,* 369 U. S. 749, and *Gojack v. United States,* 284 U. S. 702—and probably much earlier.

Moreover, *United States v. Levine,* 267 F. 2d 335 (C. A. 2), is a slender reed indeed. That decision was affirmed here, true enough (*Levine v. United States,* 362 U. S. 610), on the authority of *Brown v. United States,* 359 U. S. 41. But when *Brown* was then overruled in *Harris v. United States,* 382 U. S. 162, on this petitioner's first appearance here, *Levine* necessarily fell with *Brown.*

in *Beavers v. Henkel,* 194 U. S. 73, 85, "And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which, by the Constitution and laws, the final trial must be had."

An interstate telephone call, however, is subject to the Communications Act, and that circumstance focuses attention on the two sections of that Act cited in the subpoena.

Section 501 of Title 47 is simply a penalty provision; it throws no light whatever on the nature of the prohibited acts.

Section 203(c) provides, insofar as here pertinent, that "No carrier * * * shall * * * extend to any person any privileges or facilities in such communication * * * except as specified in such schedule."

How does that provision render illegal interstate telephone calls in respect of a dice game in Florida? The district court could, of course (*Hanley v. Donoghue,* 116 U. S. 1), judicially notice the laws of Florida. That State rather comprehensively makes criminal gambling of various forms (Fla. Ann. Stat., ch. 849), although, interestingly enough, it is not an offense in Florida to possess "ordinary dice and playing cards" (Fla. Ann. Stat., Sec. 849.231).

The only way, therefore, that either gambling in Florida or telephoning about it can possibly add up to a violation of the Federal Communications Act is on the footing adopted by the court below on the first appeal (334 F. 2d at 462-463), namely, that the long line telephone tariffs of the Bell System and its several component corporations forbid the use of any of their instruments for an illegal purpose. The tariff so providing is the vital link—the nexus, the linchpin—that allegedly transforms a telephone call concerning a dice

game in Florida into a violation of Title 47 U. S. C. in New York. Without that tariff, the connection fails.

But, the tariff was never put into evidence. The consequence is inescapable that the pertinency of the unanswered questions to the subject of investigation set forth in the subpoena was never made out.

The tariff of a regulated utility, plainly enough, is not within the scope of judicial notice even on the most liberal reading; for, plainly, it does not qualify either as a fact of general knowledge or of common experience, or as a matter of sufficient notoriety. Significantly, this Court in fairly recent years refused to notice judicially the contents of files in the General Land Office relating to the selection of depot grounds by a railroad, saying that the relevant documents should have been introduced into evidence. *Great Northern R. Co. v. Steinke,* 261 U. S. 119, 125-126. On that basis, plainly, any tariffs filed by a telephone company with the Federal Communications Commission do not qualify as subjects of judicial notice, the less so since they are subject to constant modification.

At the present trial, the prosecution had been put on notice of the importance of the tariff, in view of what had transpired on the first appeal.[2]

But, with ample opportunity to do so, the prosecution never offered the tariff at the second trial now in question—the vital tariff that supplied a link between the asserted dice game in Ojus, Florida, and the matters

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2. The prosecution recognized the deficiency in the record on the first appeal, when it attempted to supplement the record it had made at petitioner's first trial by including the relevant tariff as an Appendix to its brief in the court below. A motion to strike that portion of the prosecution's Appendix was denied, without statement of reasons.

prohibited by the Federal Communications Act, the only matters that the grand jury, before which appellant appeared, was investigating, according to the subpoena compelling his attendance as a witness.

Consequently, since the pertinency of the unanswered questions to the stated subject of the grand jury's inquiry was not shown, the present conviction for refusal to answer them cannot stand. For petitioner was entitled to refuse to answer questions not shown to be pertinent.

Third. Here, in order to show that there was no substantial relationship between the questions petitioner refused to answer and the criminal statutes cited in the subpoena served upon him, he demanded the production of documents and information in possession of the prosecution (R. 32a-33a; Def. Ex. C, R. 96a-97a). The prosecution refused that request (R. 35a).

So the simple issue here is whether the United States may prosecute an individual for acts in respect of which it simultaneously deprives him of a defense against such prosecution.

It is settled, of course, that a judgment of conviction cannot stand where the prosecution has deliberately withheld evidence from the defense. *Brady v. Maryland,* 373 U. S. 83; *Ashley v. State of Texas,* 319 F. 2d 80 (C. A. 5), certiorari denied, 375 U. S. 931. And see, *Barbee v. Warden, Maryland Penitentiary,* 331 F. 2d 842 (C. A. 4); cf. *Curran v. State of Delaware,* 259 F. 2d 707 (C. A. 3); *Griffin v. United States,* 183 F. 2d 990 (D. C. Cir.). By parity of reasoning, a new trial is required where essential information has negligently been withheld from defendants by the prosecution. *United States v. Consolidated Laundries Corp.,* 291 F. 2d 563 (C. A. 2).

An analogous problem is presented when the Government in a criminal case asserts a privilege in documents which the accused needs in order to defend against the accusation made. The court below, in a notable series of cases, held that the Government must choose between giving up its privilege or giving up the prosecution. It will not be permitted to prosecute a citizen while simultaneously it impairs his ability to defend. *United States v. Andolschek,* 142 F. 2d 503; *United States v. Beekman,* 155 F. 2d 580; *United States, v. Grayson,* 166 F. 2d 863.

Indeed, it was this precise line of reasoning that led to the *Jencks* doctrine, see *Jencks v. United States,* 353 U. S. 657, 670-672, and then to the so-called Jencks Act, 18 U. S. C. § 3500.

Accordingly, where Government agents have deliberately destroyed Jencks Act documents before trial, the conviction must be set aside, as indeed a recent case specifically holds, *United States v. Lonardo,* 350 F. 2d 523 (C. A. 6).

To paraphrase *United States v. Zwillman,* 108 F. 2d 802, 803-804 (C. A. 2), it is true that the Government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest. But if it chose to adopt such an attitude and to confine petitioner's defense only to showing that the questions asked bore *on their face* no substantial relationship to the statute referred to in the subpoena as the subject of the inquiry, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate the lack of such substantial relationship. In the present case the Government prevented petitioner from showing lack of such relationship and thereby deprived him of his

right to a proper trial where he could offer evidence in his defense. Petitioner was here a defendant and not a mere witness.

Fourth. Since immunity is granted by 47 U. S. C. § 409(L) only when the testimony is elicited in "any cause or proceeding * * * based upon or growing out of any alleged violation of [the Federal Communications Act]," and since here the questions involved do not on this record—the tariff being missing—show any violations of that act, the immunity provision on which petitioner's conviction was grounded is plainly applicable.

On this point it is only necessary to refer to Judge Kalodner's persuasive, and, it is submitted, unanswerable dissent in *United States v. Testa,* 326 F. 2d 730-735 (C. A. 3), certiorari denied, 376 U. S. 931.

At the very least, his views underscore the substantiality of the contentions now made, in respect of a question that is shown to be a recurring one.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

November, 1966.

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APPENDICES.

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APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 36—September Term, 1966.

(Argued October 24, 1966 Decided October 25, 1966.)

Docket No. 30600

UNITED STATES OF AMERICA,
Appellee,

v.

AL HARRIS,
Appellant.

Before: LUMBARD, *Chief Judge,* MOORE and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, sitting without a jury in a criminal contempt proceeding under Rule 42(b), Federal

Rules of Criminal Procedure, and from the subsequent sentence of one year. The order of the district court is modified to provide that the sentence is for imprisonment of six months and, as such, the judgment is affirmed.

ANDREW J. MALONEY, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York and Otto G. Obermaier, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

JACOB KOSSMAN, Philadelphia, Pa., *for appellant.*

PER CURIAM:

Once more Al Harris has been found guilty by the United States District Court for the Southern District of New York for refusing to answer the questions propounded on July 31, 1963 before a grand jury and again on August 1, 1963 before Judge McLean, following a grant of immunity pursuant to the Federal Communications Act, 47 U. S. C. § 409(l)

Harris was convicted of contempt by Judge McLean pursuant to Rule 42(a), Federal Rules of Criminal Procedure, and this court affirmed his conviction, 334 F. 2d 460 (1964). The Supreme Court reversed, 382 U. S. 162 (1965), and on remand Harris was tried before Judge Murphy, without a jury, in accordance with Rule 42(b), Federal Rules of Criminal Procedure, and again found guilty. On May 16, 1966, he was sentenced to a year in jail.

Subsequent to Judge Murphy's sentencing of Harris, the Supreme Court in *Cheff v. Schnackenberg,* 384

U. S. 373, 380 (1966), announced the rule that "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof."

Accordingly, as all parties concede, the district court exceeded its power in sentencing Harris to more than six months, as the finding of guilt was not made by a jury.

As we find no other error in the proceedings and no merit in any other contentions raised on this appeal, we reduce the sentence imposed by the district court from one year to six months, in the exercise of the "peculiar power of the federal courts to revise sentences in contempt cases," *Cheff v. Schnackenberg, supra* at 380; see *Green v. United States,* 356 U. S. 165, 188 (1958); *United States v. Levine,* 288 F. 2d 272 (2 Cir. 1961), and we affirm the judgment.

The order of the district court is modified to provide that the sentence is for imprisonment of six months.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, *Chief Judge,* HON. LEONARD P. MOORE, HON. IRVING R. KAUFMAN, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AL HARRIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified said order be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

Statutes Involved.

1. Section 192 of Title 2, U. S. C., as amended, provides as follows:

"*§ 192. Refusal of witness to testify or produce papers*

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. Section 401 of Title 18, U. S. C., provides in pertinent part as follows:

"*§ 401. Power of court*

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and one other, as—

* * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

3. Section 203(c) of Title 47, U. S. C., provides as follows:

"*§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations.*

* * *

"(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule."

4. Section 409(L) of Title 47, U. S. C., provides as follows:

"*§ 409. Hearings—Filing of initial decisions; exceptions*

* * *

"Self-incrimination

"(L) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedi-

ence to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

5. Section 501 of Title 47, U. S. C. provides as follows:

"*§ 501. General penalty*

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that

any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

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